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No. 80-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

JOHN PAUL MINARIK,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA FOR THE WESTERN DISTRICT

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June 16, 1981

Questions Presented for Review

I.

Is the Due Process Clause of the 14th Amendment violated when a state court, before accepting a plea of guilty to murder generally, fails to determine that the defendant understands the mental state which the prosecution would be required to establish at trial to obtain conviction, where the defendant indicates without contradiction that he has no memory of the commission of the alleged crime, and where the state has not otherwise established that the defendant understood the mental state required for conviction?

II.

Does the Due Process Clause of the 14th Amendment require that a state court, before accepting a plea of guilty to murder generally from a defendant who indicates without contradiction that he has no memory of the commission of the alleged crime,

determine the extent to which the defendant's amnesia affects his ability to assist in his defense and explore the prospects of the defendant's memory being restored in the near future by appropriate treatment?

III.

Does a state appellate court violate the Due Process and Equal Protection Clauses of the 14th Amendment when it departs without warning or justification from its long-established practice of not deciding issues not presented for decision, where it raises sua sponte and decides erroneously an issue not presented or briefed, and thereby denies to petitioner both the right to participate in the appellate process and the benefit of a controlling precedent concededly applicable to his case and under which he was entitled to a new trial?

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Opinions Below

The opinions of Justices Rolf Larsen and Samuel J. Roberts of the Supreme Court of Pennsylvania are reported at Commonwealth v. Minarik, 427 A.2d 623 (Pa. 1981), and are reproduced as Appendix A to this petition (pp. A1 through A23). The order of the Supreme Court of Pennsylvania denying reargument is unreported and is reproduced as Appendix B to this petition. The opinion and order of the Court of Common Pleas of Allegheny County, Pennsylvania (Zavarella, J.) granting the petition to withdraw the plea of guilty and awarding a new trial is unreported and is reproduced as Appendix C to this petition (pp. C1 through C39).

Jurisdiction

On April 30, 1980, the Court of Common Pleas of Allegheny County granted a petition to withdraw a plea of guilty and awarded a new trial. On March 13, 1981, the Supreme Court of Pennsylvania, on appeal by the Common-

wealth, reversed and dismissed the petition to withdraw the plea of guilty.

A timely application for reargument was filed and was denied by per curiam order on April 17 , 1981.

This Court has jurisdiction to review the order of the Supreme Court of Pennsylvania pursuant to 28 U.S.C. § 1257(3).

Constitutional Provisions Involved

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> " .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioner John Paul Minarik was indicted for murder generally and voluntary

manslaughter under the Penal Code of 1939, formerly 18 P.S. §§ 4701, 4703, in the Court of Common Pleas of Allegheny County, Pennsylvania. On October 4, 1971, Minarik, while represented by the Public Defender, tendered a plea of guilty to murder generally. After the trial court conducted a plea colloquy,[1/] the plea was accepted. The trial court then determined that the crime committed was first degree murder and petitioner was sentenced to life imprisonment.

On May 31, 1977, Minarik filed a "Petition to Withdraw Plea of Guilty," asserting as grounds for plea withdrawal that (1) the trial court had failed to advise him of the elements of the crimes

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1/ The plea colloquy is set forth virtually verbatim in the opinion of the Court of Common Pleas granting plea withdrawal and awarding a new trial on April 30, 1980. See Appendix C to this petition, pp. C1 through C20).

encompassed within a general charge of murder as was required by controlling Pennsylvania judicial decisions and by the Due Process Clause of the U.S. Constitution, 2/ and that (2) the petitioner, at the time of tendering the plea, had no recollection of the events of the evening of the alleged

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2/ The petition to withdraw the plea of guilty alleged with respect to the first ground (¶ 4):

> "The guilty plea entered by petitioner and accepted by this Court on October 4, 1971 is invalid in that this Court failed to advise petitioner of the elements of crimes encompassed within a general charge of murder, Petitioner, a lay person, was at the time of entry of the guilty plea unaware of the elements of such crimes and of the legal definitions applicable. Under controlling decisions of the Supreme Court of Pennsylvania, the guilty plea entered in this matter is invalid and leave must therefore be granted to withdraw it. Commonwealth v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974); Commonwealth v. Minor, __ Pa. __, 356 A.2d 346 (1976); Commonwealth v. Schork, __ Pa. __, 356 A.2d 355 (1976). Failure to advise petitioner of the elements of the crimes within a general charge of murder prior to acceptance of the proffered guilty plea violates the Due Process Clause of the 14th Amendment of the U.S. Constitution as well. Henderson v. Morgan, __ U.S. __, 96 S. Ct. 2253, 49 L.Ed.2d 108 (1976)."

murder, that a number of psychiatrists had been consulted but had failed to restore petitioner's memory, and that the trial court had erred in having failed to order a hearing on the issue of petitioner's competence to stand trial or to plead guilty.[3/]

On April 30, 1980, after a delay of three years, the Court of Common Pleas of

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3/ The petition to withdraw plea of guilty alleged with respect to this second ground (¶¶ 5, 6 & 7):

> "At the time of entry of the plea of guilty, petitioner, in response to questioning by this Court, on several occasions indicated that he had no recollection of the events of the evening of February 7, 1971, the time of the murder with which he was charged.
>
> "Defense counsel indicated to this Court that 'a number of psychiatrists' had been consulted and, notwithstanding their efforts, petitioner's memory of the evening of February 7, 1971 had not been restored."
>
> "This Court erred in failing sua sponte to order a hearing on the issue of whether petitioner was on October 4, 5 & 6, 1971 competent to stand trial at all, much less to plead guilty to the commission of a crime at a time and date for which petitioner, because emotionally disturbed, had no memory."

Allegheny County (Zavarella, J.) entered an order granting plea withdrawal and awarding petitioner a new trial. The Court of Common Pleas held that the failure of the trial court in 1971 to have explained to petitioner the mental state which the Commonwealth would be required to prove to establish first degree murder invalidated the plea of guilty under the decision of the Supreme Court of Pennsylvania in Commonwealth v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974), held to be applicable to pre-Ingram pleas in Commonwealth v. Minor, 467 Pa. 230, 356 A.2d 246 (1976). The Court of Common Pleas rejected the Commonwealth's contention that the petition to withdraw was untimely and rejected as well the Commonwealth's argument that although the plea colloquy of October, 1971 was defective under the Ingram and Minor decisions, the Commonwealth should nevertheless be permitted to establish the validity of the

plea by introduction of evidence de hors the colloquy.

In light of its reliance on Pennsylvania caselaw (Ingram and Minor), the Court of Common Pleas did not pass on either petitioner's argument that the guilty plea was also invalid under the Due Process Clause of the U.S. Constitution or on petitioner's contention that his lack of memory of the events of the alleged crime rendered his plea invalid.

The Commonwealth appealed to the Supreme Court of Pennsylvania and presented two issues for decision: first, should Commonwealth v. Minor be overruled? and second, if not, should the Commonwealth be permitted to improve the defective plea colloquy by introduction of evidence from outside the colloquy?[4/]

4/ See lower margin, next page.

Petitioner, as appellee, responded as follows in the Supreme Court of Pennsylvania:

- o Commonwealth v. Minor should not be overruled;
- o Commonwealth v. Minor could not be overruled because the principle of that case was now required by Henderson v. Morgan, 426 U.S. 637, 49 L.Ed.2d 108 (1976);
- o No supplementation of a defective plea colloquy should be permitted because such supplementation was prohibited by a long line of Pennsylvania decisions.

4/ The exact statement of the Commonwealth's two issues, taken from the Commonwealth's Brief for Appellant in the Supreme Court of Pennsylvania, was:

> "Whether the Ingram rule, requiring an on the record colloquy of the specific elements of the offense charged, is applicable to a guilty plea accepted prior to the date of that decision, or whether the standard enunciated by the case effectuated a new rule of law?"
>
> "Alternatively, whether a post-conviction proceeding is the proper vehicle by which to assess compliance with Ingram, if applicable, when the record itself fails to reveal express compliance with the rule requiring knowledge of elements of the crime to ensure a valid, voluntary plea."
>
> Brief For Appellant at 3.

The Commonwealth did not present as an issue for decision by the Supreme Court of Pennsylvania its contention, rejected by the trial court, that the plea withdrawal petition was untimely. Neither the Commonwealth nor petitioner briefed or argued the petitioner's second ground for relief (amnesia at the time of the plea), the trial court not having found it necessary to decide that issue in ordering the plea withdrawal and the new trial.

The Commonwealth's appeal was submitted on the briefs by agreement and without oral argument.[5/]

5/ The granting of the new trial on April 30, 1980 and the attempt by petitioner Minarik to be bailed pending his new trial generated a considerable amount of publicity in the Pittsburgh area. A citizens' group was formed in the Greenfield area of Pittsburgh and solicited signatures for an antibail petition. The many newspaper articles which appeared invariably identified petitioner as "ax murderer" in the headline or story lead.

[Fn. contd., next page.]

On March 13, 1981, the Supreme Court of Pennsylvania filed two opinions and entered an order reversing the Court of Common Pleas and dismissing the plea withdrawal petition. See Appendix A to this petition. 6/

[Fn. 5, contd.]

On June 12, 1980, the Court of Common Pleas denied bail altogether. The Supreme Court of Pennsylvania denied all bail on December 1, 1980. On application for federal habeas corpus, the United States District Court for the Western District of Pennsylvania (Paul A. Simmons, J.) held that Pennsylvania's total denial of bail violated the 8th Amendment. Minarik v. Howard, Civ. Action No. 80-1749 (W.D. Pa., decision Jan. 13, 1981). The Court of Common Pleas, after a lengthy bail hearing, then set bail at $ 100,000. On February 6, 1981, petitioner was released after posting 10% of that amount.

Evidence at the bail hearings revealed that petitioner, who holds a degree of B.S. in Mechanical Engineering, has a fault-free prison record, is regularly employed as a dental assistant in the prison hospital, and teaches college courses within the prison in mathematics, physics, creative writing and poetry for local colleges, including the University of Pittsburgh. He was married in 1979 and has two stepchildren. Mr. Minarik has published three volumes of his poetry: J. Minarik, A Book (V. Mark Press 1974); J. Minarik, Patterns in the Dusk (King Pubs. 1978); J. Minarik, Past the Unknown Remembered Gate (Cosmep Project 1981). He is listed in the Directory of American Poets, the International Who's Who in Poetry, and in Contemporary Authors.

6/ On March 16, 1981, Mr. Minarik voluntarily appeared at a bail revocation hearing, bail was revoked, and he was returned to prison. He had been on bail for 37 days. While on bail, Mr. Minarik worked as a project engineer for a local industrial construction company.

In one opinion, Justice Rolf Larsen, joined by Justices Flaherty and Kauffman, indicated that he would overrule Commonwealth v. Minor. Justice Larsen then went on to indicate that he would reject as "blatantly meritless" petitioner's contention that the plea of guilty was invalid under the federal constitution and petitioner's contention that his lack of memory invalidated his plea,[7/] notwithstanding the fact that neither the trial court below nor any party to the appeal had briefed or argued this second ground for withdrawal.

7/ Justice Larsen described petitioner's claim as one of "inexact recollection." Appendix A at A18. This characterization is inappropriate. Petitioner alleged that he "had no recollection" of the events of February 7, 1971 ... " and that psychiatric consultation notwithstanding, his "memory ... had not been restored." The testimony of petitioner at the degree of guilt hearing was that he recalled having been at a party during the evening of February 6, 1971, recalled vaguely being in a car, and recalled awakening in a hospital bed. He testified that he had no recollection whatever of arming himself, of entering the victim's home, of killing the deceased, or of driving to a police station and surrendering. See Reproduced Record (Sup. Ct. of Pa.) 152a-155a.

Although no majority had been mustered in support of overruling Commonwealth v. Minor, Justices Larsen, Flaherty, and Kauffman voted to reverse as though Minor had been overruled and was no longer controlling.

In the second opinion, Justice Samuel J. Roberts, joined by Chief Justice O'Brien and Justice Nix, indicated that he would not overrule Minor. Given the 3-3 division on the validity of Minor, an affirmance by an equally divided court might have then been expected. Justice Roberts, however, then went on to indicate that he regarded the petition to withdraw the plea of guilty as untimely filed and, although that issue had been abandoned by the Commonwealth, had not been presented for decision, and was not briefed or argued by any party, he then voted to reverse on the ground that the petition to withdraw the plea was untimely.

Petitioner timely filed an application

for reargument in which he set forth five points.[8/] In two of those points, petitioner briefed for the first time two issues of federal constitutional law:

- That a denial of Due Process had been caused by the Supreme Court of Pennsylvania's sudden departure from its well-established policy of refusing to decide issues not presented by the parties for decision; and

- That the petitioner's lack of memory at the time he pleaded guilty in October, 1971 rendered his plea invalid under the U.S. Constitution.

Petitioner was compelled to brief these issues for the first time in an application for reargument, of course, because the Supreme Court of Pennsylvania had for some reason chosen to ignore its long line of prior cases of refusing to reach issues not presented for decision by the litigants.

8/ See lower margin, next page.

Reasons for Granting the Writ

Issue One

There is no dispute whatever that the plea colloquy in this case fails to reflect the trial court's having explained to petitioner the mental state required for first or second degree murder. There is no attempt to explain the critical concept

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8/ The five points were:

(1) The Supreme Court of Pennsylvania had failed to resolve the validity of Minor and with a recently-appointed seventh justice, reargument would result in a definitive ruling on that question;

(2) The Supreme Court of Pennsylvania had unjustifiably departed from its own firmly-established policy of not deciding issues not presented for decision;

(3) The Supreme Court of Pennsylvania had violated the U.S. Constitution when it had decided, without warning to petitioner, issues not presented for decision and on which petitioner had not had the opportunity to file a brief or to present argument to the court;

(4) The petition to withdraw the plea of guilty was not untimely under Pennsylvania law; and

(5) Petitioner's amnesia may, under the 14th Amendment, have rendered him incompetent to stand trial or plead guilty.

of "malice" or "malice aforethought"; indeed, the words do not appear at any point in the plea colloquy. There is further no dispute that the plea colloquy reflects that the trial court did not ascertain from defense counsel that counsel had earlier explained the mental states required of the different degrees of murder under Pennsylvania law. The record does reflect that the clerk read the indictment to the petitioner, a reading which the trial court prefaced with the comment that the language of the indictment "is somewhat quaint." Reproduced Record (Sup. Ct. of Pa.) 10a.[9/] That indictment, reproduced below, is quaint indeed; it reads like a 14th century English trespass vi et armis writ.

9/ "The GRAND INQUEST of the Commonwealth of Pennsylvania, now inquiring in and for the body of the Court of Allegheny, upon their oaths and solemn affirmations, respectively, DO PRESENT that JOHN P. MINARIK, late of the County aforesaid,

[Fn, contd., lower margin, next page.]

There is, however, in the plea colloquy a good deal of discussion of the petitioner's lack of memory of the events of February 7, 1971, that petitioner had consulted "a number of psychiatrists" and that "even with their consultation, [petitioner] [has] been unable to recall the exact events of that evening." The trial court asked the petitioner whether, having "acquaint[ed] [him] self with all the relevant information," he had "cause[d] her death as charged in the indictment." The petitioner said he had, but at no point is there an inquiry into or acknowledgement of petitioner's having

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[Fn. 9, contd.]
on the seventh day of February in the year of our Lord, one thousand nine hundred and seventy-one at the County aforesaid, and within the jurisdiction of this Court with FORCE AND ARMS, in and upon the body of Rosemary Kacsuta in the peace of God and of this Commonwealth then and there being, unlawfully did make an assault, and her the said Rosemary Kacsuta then and there unlawfully did kill and slay, contrary to the form of the Act of General Assembly in such cases made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania."

had the requisite mental state.

At the time petitioner sought to withdraw his plea (in May, 1977), at the date the trial court got around to granting that petition and ordering a new trial (April, 1980), at the date the Supreme Court of Pennsylvania reversed (March, 1981), and at present, there can be no dispute that petitioner's plea of guilty is invalid under the decisions of the Supreme Court of Pennsylvania interpreting the Due Process Clause of the 14th Amendment.

In Commonwealth v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974), the Supreme Court of Pennsylvania held unanimously that prior to accepting a plea of guilty a trial court must determine "that the defendant ... under-[stands] the nature of the charges to which he is pleading." 316 A.2d at 77. The court in Ingram traced this requirement back to this Court's decision in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969),

a case in which it was held to be "error, plain on the face of the record, for the trial judge to accept [a] guilty plea without an affirmative showing that it was intelligent and voluntary." 395 U.S. at 242. The Supreme Court of Pennsylvania went on in Ingram to state its understanding of how a trial court should proceed to make a record that a plea was "intelligent and voluntary":

> "In order to demonstrate that a defendant possesses such understanding, he certainly must be told more than just that he has been charged with murder or robbery, for example. While such terms clearly connote some meaning to the layman, this meaning does not always embrace the basic legal elements of the crime. If this were not the case, there would be no need for instructions to a jury on such points, for certainly an average defendant cannot be presumed to understand more than an average juror. Thus, for examination to demonstrate a defendant's understanding of the charge, the record must disclose that the elements of the crime or crimes charged were outlined in understandable terms."
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> 316 A.2d at 80 (emphasis supplied).

In Commonwealth v. Minor, 467 Pa. 230, 356 A.2d 346 (1976), the Supreme Court of Pennsylvania held that Ingram announced no new law and was applicable to all pleas taken after Boykin.[10/]

The Court of Common Pleas, in ordering a new trial in April, 1980, found it very clear that this plea was invalid under Ingram, as made applicable by Minor, and the Commonwealth agreed that was the case. In appealing the grant of the new trial, the Commonwealth argued only that Minor should be overruled, not that it was inapplicable to this case.

Pennsylvania, by its 3-3 split on the

10/ Actually, Ingram was held in Minor to apply to all guilty pleas taken after the effective date of Pa.R.Crim.P. 319(a), or Feb. 3, 1969. Pennsylvania, by adoption of a rule of criminal procedure, anticipated Boykin, decided later in 1969.

question of Minor's validity and by the sudden departure by three of its justices from the principle of not inventing questions not submitted by the parties and not briefed and argued, has denied to petitioner the benefit of Minor and Ingram (which all counsel concerned and all Pennsylvania courts agree have been violated) and, more importantly, have denied to petitioner the benefit of the Due Process Clause of the 14th Amendment.

In Henderson v. Morgan, 426 U.S. 637, 49 L.Ed.2d 108, 96 S. Ct. 2253 (1976), this Court was faced with the question whether a constitutionally valid plea of guilty had been taken to second degree murder (1) when defendant claimed accurately that the intent element of that crime had not been explained to him; (2) where there was nothing else in the record to show that defendant understood that element of the offense or admitted having acted with that

intent; and (3) where the district court, after an evidentiary hearing ordered by the Second Circuit, had found as a fact that the defendant had not understood that element of the crime to which he pleaded guilty. Mr. Justice Stevens, writing for the Court, observed that no constitutionally-valid plea could be taken from a defendant without "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process. Smith v. O'Grady, 312 U.S. 329, 334, 61 S. Ct. 572, 574, 85 L.Ed. 859 [1941]," and therefore affirmed the decision of the lower courts which had invalidated the plea.

This Court, aware that no prior decision contained an explicit requirement that all elements of the offense be explained to a defendant tendering a plea of guilty, sought to limit Henderson v. Morgan as follows:

> "Normally the record contains either an explanation of the

> charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. This case is unique because the trial judge found as a fact that the element of intent was not explained to respondent. Moreover, respondent's unusually low mental capacity provides a reasonable explanation for counsel's oversight; it also forecloses the conclusion that the error was harmless beyond a reasonable doubt, for it lends at least a modicum of credibility to defense counsel's appraisal of the homicide as a manslaughter rather than a murder."
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> 426 U.S. at 647.

Justices White, Stewart, Blackmun and Powell joined in a concurring opinion to the effect that the guilty plea was invalid under Boykin because its validity was not only not demonstrated by the state record but, to the contrary, had been found invalid.

The limiting language of Henderson v. Morgan, quoted above, has created difficulty for lower federal courts and state courts. There are a number of possible interpretations of the decision:

> (1) There is no requirement under the federal constitution that a state judge explain any of the elements of an offense to a defendant prior to accepting a plea of guilty. In the general case, it will be presumed that defense counsel explained the elements of the offense, or that a reading of the indictment made him aware of the elements. Henderson v. Morgan holds that only when the defendant is known to possess unusually low mental capacity and is pleading to an offense not set forth in the indictment and has not had that offense explained to him by his defense counsel and a judge has found this to be the case, then the plea is invalid.
>
> (2) There is no requirement under the federal constitution that a state judge explain any of the elements of an offense to a defendant prior to accepting a plea of guilty. There is, however, under Boykin a requirement that a plea be shown by the state to be "intelligent and voluntary," and a plea is not

> intelligent and voluntary unless the defendant is aware of the nature of the charges. There are a number of ways that a state can show that the defendant was aware of the nature of the charges: advice by the trial court on the record at the time of the plea; inquiry by the trial court at the time of the plea whether the defense counsel has advised his client of the nature of the charges; perhaps reading the indictment. To sustain the plea, however, the defendant must have a factual awareness and understanding of the charges against him, and there is no irrebutable presumption that all defense counsel instruct all defendants or that all defendants obtain a knowledge of the nature of the charges by a reading of the indictment. An evidentiary hearing may have to be held where the existing record is not sufficient to show that the defendant was in fact aware of the nature of the crime or crimes to which he was pleading guilty.
>
> (3) There is a requirement under federal constitutional law that a state trial judge explain the elements of the offense to a defendant prior to accepting a plea of guilty.

This Court, in deciding Henderson v. Morgan, was doubtless attempting to avoid the third interpretation: elements advice required by

federal constitution in all state guilty pleas. Probably this Court in Henderson v. Morgan intended approximately the second interpretation. In fact, the limiting language has caused courts to adopt all three interpretations.

The Supreme Court of Pennsylvania in this case has read Henderson v. Morgan as creating a presumption that counsel explained the elements of the offenses, and has held that presumption sufficient to establish the validity of the plea unless petitioner has alleged and demonstrated ineffective assistance of counsel. See Appendix A at A18. Justice Larsen evidently does not regard an allegation that petitioner did not know the elements of the various degrees of murder at the time he plead guilty as sufficient. See note 2, supra.[11/]

11/ It should be recalled that at the time petitioner sought to withdraw his plea, it was clear that the plea was invalid, as it is clear today that it is invalid. At no point in the many Ingram cases has there ever been an indication that counsel must be shown to have been ineffective before an otherwise invalid plea will be vacated.

This Court in the Brady trilogy[12/] has held that where a defendant pleads guilty on advice of counsel and then attacks that decision at a later time, then he must show that the advice of his counsel that he plead guilty was "gross error on the part of counsel." 397 U.S. at 772. Where the question is whether a record under Boykin has been made sufficient to support a conclusion that the plea is "intelligent and voluntary," this Court has never in its past decisions imposed a requirement that counsel be also shown to have acted ineffectively. Indeed, the most recent Boykin decision, Henderson v. Morgan, assumes as a given the "overwhelming evidence of guilt," the "competence of counsel," and the "wisdom of their advice to plead guilty," 426 U.S. at 644, and yet invalidates the plea.

12/ Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463 (1970); Parker v. North Carolina, 397 U.S. 790, 40 S. Ct. 1458 (1970); McMann v. Richardson, 397 U.S. 749, 90 S. Ct. 1441 (1970).

The Supreme Court of Pennsylvania has interpreted the "presumption" of which this Court spoke in Henderson v. Morgan as a means of upholding pleas of guilty where the plea colloquy does not show that the defendant was aware of the nature of the charges and where the state has conducted no further proceedings to establish that the defendant nevertheless had such awareness. Petitioner suggests that this is a much too limited and hostile interpretation and serves to limit Boykin. It is doubtful in the extreme that this Court granted review in Henderson v. Morgan for the purpose of limiting Boykin.

There are a number of courts which read Henderson v. Morgan as having done to federal review of state guilty pleas what McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166 (1966), and F.R.Crim.P. 11 did to federal pleas of guilty. In Sober v. Crist, 644 F.2d 807 (9th Cir. 1981), the Ninth Circuit only recently held that a state

prisoner was entitled to an evidentiary hearing on his allegation that his plea was invalid. Quoting McCarthy (defendant must have an "understanding of the essential elements of the crime charged, including the requirement of specific intent"), the Ninth Circuit held that "[t]he same requirement was applied to a state prisoner in Henderson v. Morgan ..."

In Sierra v. Government of Canal Zone, 546 F.2d 77 (5th Cir. 1977), the Fifth Circuit indicated that it read Henderson v. Morgan for the proposition that "[w]hen mens rea is such a crucial element of an offense, the district court must determine, on the record by personally advising the defendant, that the defendant understands the nature of the mental element." 546 F.2d at 80.

In Rinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977), the Eighth Circuit affirmed a grant of federal habeas corpus to a state prisoner on the ground, inter alia, that the

state trial court had failed to explain the mental element of second degree murder:

> "Rinehart understood neither the nature of the charge nor the consequences of his guilty plea because of the inadequate explanations of the law given to him by defense counsel and the court. There is uncontradicted evidence in the record which suggests that Rinehart was not informed of the elements of the crime of second-degree murder. Since his own defense counsel were confused as to the distinctions among first- and second-degree murder, and manslaughter, it is inconceivable to conclude that Rinehart would have known of the intent element required to convict him of second-degree murder or that a guilty plea would be an admission of the existence of the intent to kill. In addition, the trial judge did not explain the charge to Rinehart. If the defendant was not informed that intent to cause the victim's death is an essential element of the crime charged, his guilty plea was not voluntarily entered. Henderson v. Morgan ....."
>
> 561 F.2d at 130-31 (emphasis supplied).

And the Supreme Court of Nevada in Hanley v. State, ___ P.2d ___, 29 Crim. L. Rep. 2142 (March 20, 1981), following Henderson

v. Morgan, has held that before a plea of guilty will be deemed valid, the record must show either that the defendant admitted committing the crime charged or that he entered the plea knowing what the elements of the offense were.

The second possible interpretation of Henderson v. Morgan is typified by Harned v. Henderson, 535 F.2d 1399 (2d Cir. 1976), decided on the heels of this Court's decision in Morgan. The Second Circuit there reversed and remanded to the district court to determine whether the defendant had been informed of the requirement of New York first-degree burglary law that physical injury have resulted, as "the record before us does not indicate whether or not Harned was advised of all of the elements of burglary in the first degree." 535 F.2d at 1399. On remand, the district court, after listening to the testimony of former defense counsel to the effect that he had given

such advice, found to the contrary and granted habeas corpus relief. The Second Circuit affirmed on appeal. Harned v. Henderson, 588 F.2d 12 (2d Cir. 1978).

As petitioner has shown, there is a real conflict between the approach taken by the Supreme Court of Pennsylvania here and all other courts which have interpreted Morgan. Pennsylvania regards as sound under the federal constitution a plea of guilty which led to a conviction of first degree murder and a sentence of life imprisonment where the state-created record does not show in any manner that the defendant was ever informed of the mental state required for that crime and where the defendant alleges that he had no such knowledge. All other courts which have attempted to interpret Morgan have either regarded the state as under an obligation to instruct the defendant of the mens rea or specific intent element of serious felonies or to utilize post-plea

evidentiary hearings to enable the defendant to establish his lack of understanding where the state cannot cite the existing record as proof that defendant had such an understanding.

Petitioner therefore respectfully requests that this Court grant review to resolve this conflict and to protect petitioner's constitutional right not to be convicted on a plea of guilty which has not been shown to be intelligent and voluntary.[13/]

13/ If this Court does not deem the question presented as worthy of resolution after briefs and argument, petitioner would suggest that the interests of justice would be served by a summary vacation of the order of the Supreme Court of Pennsylvania and a remand with instructions that the Commonwealth establish that petitioner had knowledge of the elements of the murder offenses to which he was pleading guilty or grant a new trial, citing Boykin v. Alabama, Henderson v. Morgan, and cases such as Harned v. Henderson, 535 F.2d 1399 (2d Cir. 1976).

Issue Two

This Court has held that the Due Process Clause of the 14th Amendment prohibits a state from trying in a criminal proceeding a defendant who is not competent to stand trial. See Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836 (1966); Bishop v. United States, 350 U.S. 961, 76 S. Ct. 440 (1956).

In Robinson, this Court held that:

> "We believe that the evidence introduced on Robinson's behalf entitled him to a hearing on this issue [competency to stand trial]. The court's failure to make such inquiry thus deprived Robinson of his constitutional right to a fair trial. See Thomas v. Cunningham, 313 F.2d 934 (C.A. 4th Cir. 1963).
>
> * * *
>
> "Having determined that Robinson's constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial, we direct that the writ of habeas corpus must issue and Robinson be discharged unless the State gives him a new trial within a reasonable time."

86 S. Ct. at 842.

Where the trial court has failed to protect the constitutional rights of a defendant not to be brought to trial if incompetent, the remedy is not to determine whether, in fact, the defendant was competent at the time of the earlier trial. Rather the remedy is to vacate the conviction and to remand for a new trial. Dutsky v. United States, 362 U.S. 402, 80 S. Ct. 788 (1960) ("In view of the doubts and ambiguities regarding the legal significance of the pscyhiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse the judgment of the Court of Appeal affirming the judgment of conviction, and remand the case to the District Court for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent"); United States v. Roca-Alvarez, 474 F.2d 1274 (5th

Cir. 1973)(same).

The majority of courts have held that the standard of competence to plead guilty is the same as the standard of competence to stand trial. See, e.g., Allard v. Helgemoe, 572 F.2d 1 (1st Cir. 1978); United States ex rel. McGough v. Hewitt, 528 F.2d 339 (3d Cir. 1975); Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1975); United States v. Harlan, 480 F.2d 515 (6th Cir. 1973); Wolf v. United States, 430 F.2d 443 (10th Cir. 1979); United States v. Valentino, 283 F.2d 634 (2d Cir. 1960).

The leading case in the United States on the relationship between amnesia and competence to stand trial is the opinion of Circuit Judge J. Skelly Wright for the United States Court of Appeals for the D.C. Circuit in Wilson v. United States, 391 F.2d 460 (D.C. Cir. 1968). In Wilson the defendant had been convicted at trial

of five counts of assault with a pistol and robbery, notwithstanding his claim (which the government conceded to be true) that he was suffering from permanent retrograde amnesia which left him with no memory of the events charged in the indictment. Circuit Judge Wright approved the approach taken by the trial court to the effect that amnesia did not per se render a defendant incompetent to stand trial and that loss of memory should render a defendant incompetent "only when its [memory's] presence would in fact be crucial to the construction and presentation of a defense and hence essential to the fairness and accuracy of the proceedings." 391 F.2d at 462. Circuit Judge Wright, however, found inadequate the post-trial findings made by the trial court in Wilson and remanded for further proceedings:

> "[W]e remand to the trial judge for more extensive post-trial findings on the question of whether the appellant's loss of memory did in fact deprive him of the fair trial and effective assistance of counsel to which the Sixth and Fifth Amendments entitled him."

Judge Wright then summarized the D.C. Circuit's approach to amnesia as follows:

> "A prediction of the amnesic defendant's ability to perform these functions must, of course, be made before trial at the competency hearing. But where the case is allowed to go to trial, at its conclusion the trial judge should determine whether the defendant has in fact been able to perform these functions. He should, before imposing sentence, make detailed written findings, after taking any additional evidence deemed necessary, concerning the effect of the amnesia on the fairness of the trial."
>
> 391 F.2d at 463.

Judge Wright then reviewed a number of facts important in determining the fairness of bringing an amnesiac to trial: extent to which the amnesia interferes with the ability of the defendant to assist his counsel; extent to which amnesia interferes

with the defendant's ability to testify on his own behalf; the extent to which other evidence accurately reconstructs the alleged crime. One of the factors which has a strong bearing on the constitutionality of bringing an amnesiac to trial is the expected length of the amnesia. As the Fifth Circuit has held in United States v. Swanson, 572 F.2d 523, 526 (5th Cir. 1978), "[o]ne important factor is whether a continuance is likely to do any good. Granting a continuance to a defendant whose amnesia has been diagnosed as temporary may materially increase his ability to stand trial." Other federal courts are generally in agreement with Circuit Judge Wright's approach in Wilson.[14/]

14/ See, e.g., U.S. v. Sullivan, 406 F.2d 180 (2d Cir. 1969); U.S. v. Stevens, 461 F.2d 317 (7th Cir. 1972); U.S. ex rel. Parson v. Anderson, 481 F.2d 94 (3d Cir. 1973); Dhaemers v. Minnesota, 456 F.2d 1291 (8th Cir. 1972); Dye v. Cowan, 472 F.2d 1206 (6th Cir. 1973); U.S. v. Borum, 464 F.2d 896 (10th Cir. 1972). See generally Comment, Amnesia: A Case Study in the Limits of Particular Justice, 71 Yale L.J. 109 (1961).

Defendant's position in this case obviously hinges on his mental state at the time of the killing. It is obvious that amnesia would critically interfere with his ability to assist defense counsel and to inform psychiatric experts needed to prepare an analysis of his mental state on February 7, 1971.

When faced with a defendant who had no recollection of the events of the night of the killing, the trial court failed to conduct any hearing at all to determine to what extent the defendant's amnesia interfered with his competence to stand trial or to plead guilty. Furthermore, the Supreme Court of Pennsylvania, although the amnesia issue had never been briefed in the trial court, never decided in the trial court, had not been presented for decision nor briefed or argued in the Supreme Court of Pennsylvania, proclaimed "blatantly meritless" the proposition that amnesia of a

defendant can render him incompetent to plead guilty.

Petitioner is admittedly unable to point to any conflict between the action of the Supreme Court of Pennsylvania and the decisions of other courts except to say that the out-of-hand rejection by the Supreme Court of Pennsylvania on this question is blatantly contrary to all existing decisions on the point. While this Court has decided cases involving competency to stand trial (Pate v. Robinson; Dutsky), it has to petitioner's knowledge never resolved a question involving amnesia of a defendant or the effect of that amnesia on the competency of the defendant to plead guilty.

Given the close relationship between this issue and the first issue presented, petitioner would suggest that if the Court should grant certiorari on the first issue, then it should review this question as well.

Issue Three

Our system of justice contemplates an adversary process. Justice, we postulate, will result from the struggle of adversary parties to persuade a judge or jury of the rightness of their respective positions. It is a prerequisite to the sound operation of such a system that the adversaries have notice of the time and place of adversary presentation, of the issues to be litigated, and have an opportunity to participate in and to influence the judicial process. In one of the most important early 14th Amendment Due Process decisions, this Court held that "Due Process requires ... that there shall be notice and opportunity for hearing given the parties ... [T]hese two fundamental conditions ... seem to be universally prescribed in all systems of law established by civilized countries." Twinning v. New Jersey, 211 U.S. 78, 110-11 (1908). See also Baldwin v. Hale, 68 U.S. (1 Wall.) 223

(1864)("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be first notified").

Mr. Justice Frankfurter is often quoted for this eloquent passage on the meaning of Due Process:

> "The validity and moral authority of a conclusion largely depend on the mode by which it was reached ... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."
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> Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 (1951)(Frankfurter, J., concurring).

Compare In re Oliver, 333 U.S. 257, 273 (1948)(petitioner held to have been denied Due Process when convicted immediately after testifying before a one-man-judge-grand-jury without notice of the issues

and without opportunity to defend himself by argument).[15/]

The Supreme Court of Pennsylvania follows, as does this Court, a prudent policy of refusing to reach and decide issues not presented by the parties. In Weigand v. Weigand, 461 Pa. 482, 337 A.2d 256 (1975), for example, the Supreme Court reversed an intermediate appellate court for having decided an issue not presented, observing that "... sua sponte consideration of issues deprives counsel of the opportun-

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15/ Professor Tribe, in his recent treatise on American constitutional law, describes the essence of Due Process as follows:

> "Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome. These rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one.
>
> Laurence H. Tribe, American Constitutional Law 503 (1978) (emphasis in original).

ity to brief and argue the issues and the court of the benefit of counsel's advocacy ...." 337 A.2d at 257. See also Coleman v. Board of Education, 477 Pa. 414, 383 A.2d 1275 (1978); In re Noonday Club of Delaware County, Inc., 433 Pa. 458, 252 A.2d 568 (1968).

It is evident that the three justices of the Supreme Court of Pennsylvania who would not vote to overrule Commonwealth v. Minor nevertheless were casting about for some reason to deny the benefits of Minor to petitioner here. The "timeliness" issue on which the three seized was not presented by the Commonwealth for decision, was not briefed or even discussed by any party, and was reached without any notification to petitioner and without affording petitioner an opportunity to present argument or to participate in the judicial process prior to decision. The "timeliness"

issue created by the three justices of the Supreme Court of Pennsylvania was also incorrectly decided as a matter of Pennsylvania law, a fact which can be easily demonstrated but which does not merit space in this petition.

The question whether the Due Process and Equal Protection Clauses of the 14th Amendment apply to a state supreme court is, as far as petitioner can discover, novel.[16/] It is also, petitioner, suggests, a very easy question: of course these clauses of the 14th Amendment apply to the state appellate courts, just as they apply to states in all of their governmental functions.

The six justices of the Supreme Court

16/ There are Equal Protection cases which deal with appellate process and the right of indigents to have counsel appointed on a first-step direct appeal, Douglas v. California, 372 U.S. 353 (1963), or to have a free transcript if required by state rules, Griffin v. Illinois, 351 U.S. 12 (1956). Those cases clearly stand for the proposition that the Equal Protection Clause of the 14th Amendment applies to state appellate procedure.

of Pennsylvania who participated in this case strove mightily to avoid affirming a result (new trial) which the trial court and all participating counsel agreed was compelled by the prior decisions of that court. Three justices who disagreed with the policy of Minor but who had failed to muster the majority needed to overrule it voted nevertheless as if Minor were no longer law, thereby violating their oaths of office by refusing to apply the law of Pennsylvania. The other three justices, while unwilling to overrule Minor, were willing to make it inapplicable to petitioner by inventing a reason for not applying it, a reason which was not advanced by any party and which cannot withstand examination when contrasted with prior Pennsylvania decisional law on that question.

Petitioner can hardly argue that how the Supreme Court of Pennsylvania goes about conducting its business in general

presents a question of federal constitutional law, or that this Court could afford the time necessary or the friction which would be engendered by federal review of state appellate procedures.[17/]

At some point, however, an irrational, unheralded, unjustified and unjustifiable departure from established appellate procedure by a state court which results in the denial to this petitioner alone of the benefit of a principle of Pennsylvania law must be recognized as a denial of fundamental Due Process and Equal Protection.

17/ This Court has some prior experience with the inability of the Supreme Court of Pennsylvania to conduct its appellate business in a rational manner. In Aiken Industries, Inc. v. Estate of Wilson, 477 Pa. 34, 383 A.2d 808 (1978), the Supreme Court of Pennsylvania had reviewed a judgment for damages arising from breach of an anticompetition covenant. Three justices agreed that the defendant was liable but thought the damages awarded too large. Three justices were of the view that there was no liability. So, being equally divided, the Supreme Court of Pennsylvania affirmed a result with which not one justice agreed.

[Fn. contd., lower margin, next page.]

No one could plausibly argue that the Supreme Court of Pennsylvania, in announcing Commonwealth v. Minor in 1976, could have constitutionally added a caveat that no one named Minarik could receive the benefit of that decision. And yet, by the startling departure from its own appellate procedure, the Supreme Court of Pennsylvania has managed to accomplish exactly that result: Minor remains the law of Pennsylvania generally, but does not apply to any litigant named

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[Fn. 17, contd.]

On petition for writ of certiorari, Mr. Justice Blackmun, concurring in denial, wrote that the denial was inevitable because no federal constitutional issue had been presented on the application for reargument to the Supreme Court of Pennsylvania. Mr. Justice Blackmun wrote that the Supreme Court of Pennsylvania's manner of proceeding was likely to add "new recruits ... to those members of the public who are already inclined to agree with Mr. Bumble's well-known remark." 439 U.S. 877 (Oct. 2, 1978).

Petitioner here, however, has presented the federal constitutional issue arising out of the Supreme Court of Pennsylvania's departure from appellate practice directly to the Supreme Court of Pennsylvania by application for reargument.

John Paul Minarik.

Such a blatant denial of Due Process and Equal Protection under the 14th Amendment cannot be tolerated. If not reviewed and corrected by this Court, there is no remedy.

Respectfully submitted,

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COM. V. MINARIK
Cite as Pa., 427 A.2d 623

COMMONWEALTH OF PENNSYLVANIA,
Appellant,
v.
JOHN PAUL MINARIK,
Appellee.

Supreme Court of Pennsylvania

Submitted Oct. 3, 1980

Decided March 13, 1981

Reargument Denied April 17, 1981

Before O'BRIEN, C.J., ROBERTS, NIX, LARSEN, FLAHERTY, and KAUFFMAN, JJ.

O P I N I O N

LARSEN, JUSTICE:

At approximately 3:30 a.m. on February 7, 1971, appellee John Paul Minarik climbed through the window of the second-story bedroom where his former fiancee lay sleeping and, before the eyes of her mother who stood helplessly by, killed her with an ax. Appellee was arrested later that day and was

subsequently indicted by a grand jury and charged with murder and voluntary manslaughter. On October 4, 1971, appellee pleaded guilty to murder generally. After a hearing on degree of guilt, the court determined that appellee was guilty of murder in the first degree and sentenced him to life imprisonment.

Almost six years after appellee pled guilty, on May 31, 1977, he petitioned the Court of Common Pleas of Allegheny County to withdraw his guilty plea. In his petition, appellee alleged (1) that his guilty plea failed to meet procedural requirements which this Court first established in 1974,[1/] (2) that his guilty plea failed to comport with constitutionally required procedures announ-

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1/ See Commonwealth v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974).

ced by the United States Supreme Court in 1976,[2] and (3) that he was incompetent to plead guilty. On April 30, 1980, three years after the filing of appellee's petition and eight and one-half years after the entry of his guilty plea, the Court of Common Pleas, relying solely on the first ground alleged, entered an order granting the petition and allowing appellee to withdraw his guilty plea and proceed to a new trial.[3] This direct appeal by the Commonwealth followed.

The 12-page guilty plea colloquy between the trial judge and appellee reveals that at the time he pleaded guilty, appellee was 23 years old, had a bachelor's degree in engineering, had begun working toward a

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2/ See Henderson v. Morgan, 426 U.S. 637, 96 S. Ct. 2253, 49 L.Ed.2d 108 (1976).

3/ The Court of Common Pleas thus found it unnecessary to consider the merits of the second and third grounds for relief alleged in the petition.

master's degree, and was employed as an engineering trainee. During the course of the colloquy the judge informed appellee, inter alia, that he had been charged with murder and voluntary manslaughter; that the purpose of the colloquy was to determine whether he understood the meaning of the charges; that he had been charged with unlawfully and feloniously causing the death of another; that by pleading guilty he was admitting that he was guilty of murder of the second degree; that the Commonwealth had the burden of proving that the murder was wilful, deliberate and premeditated in order to raise the crime to murder of the first degree; and that he had the burden of introducing evidence to lower the degree of the crime to voluntary manslaughter. In response to the judge's questioning, appellee admitted having killed the victim; indicated that he understood everything the judge had

told him; stated that he had had adequate opportunity to meet with his counsel and that he was pleased with the representation that counsel had provided; and acknowledged that his guilty plea was the product of his own free will. At the conclusion of the colloquy, when the judge asked appellee whether he wished to say anything further, appellee responded simply: "My plea was entered voluntarily by myself. I understand."

The first issue we must resolve is whether it was proper to permit appellee to withdraw his guilty plea solely because that plea did not comply with procedures that were instituted more than two years after that plea was entered.[4/]

4/ Since we decide this issue in favor of the Commonwealth, we have no need to address the remaining issue raised by the Commonwealth, namely, the propriety of permitting an evidentiary hearing to supplement the guilty plea colloquy in order to determine if the accused was informed of the legal elements of the crime charged.

In 1974, in an opinion dealing with Rule 319(a), Pa.R.Crim.P.,[5/] this Court held for the first time that, in order to ensure that a defendant understands the nature of the charges against him, "the record (of a guilty plea) must disclose that the elements of the crime or crimes charged were outlined in understandable terms." Commonwealth v. Ingram, 455 Pa. 198, 203-4, 316 A.2d 77, 80 (1974). In 1976, however, the way was paved for what is, in effect, the retroactive application of the holding in Ingram to cases like the instant case, when this Court further held that

> the defendant's understanding of the nature and elements of the charges against him has long been

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5/ In 1974, Rule 319(a), Pa.R.Crim.P. provided: Generally. A defendant may plead not guilty, guilty, or with the consent of the court, nolo contendere. The judge may refuse to accept a plea of guilty, and shall not accept it unless he determines after inquiry of the defendant that the plea is voluntaryily and understandingly tendered. Such inquiry shall appear on the record.

> an essential part of a valid guilty plea in Pennsylvania. In this respect Ingram cannot be said to be new law.

Commonwealth v. Minor, 467 Pa. 230, 235, 356 A.2d 346 (1976)(footnote omitted.)[6/]

The guilty plea in this case was valid under the law in effect when it was entered in 1971; although the court did not inform appellee of the specific legal elements of the crime charged, the on-the-record colloquy shows that the plea was made voluntarily, knowingly and intelligently, and with a full understanding of the nature of the charges. Commonwealth v. Belgrave, 445 Pa. 311, 317,

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6/ Since the decision in Minor, this Court has required the withdrawal of several otherwise valid pre-Ingram guilty pleas solely on the grounds that those pleas failed to meet the standards set forth in Ingram. See, e.g., Commonwealth v. Zakrzewski, 485 Pa. 532, 403 A.2d 516 (1979)(guilty plea entered on June 13, 1973 and permitted by this Court to be withdraw as of July 5, 1979); Commonwealth v. Veltre, 475 Pa. 285, 380 A.2d 356 (1977)(guilty plea entered on Sept. 17, 1973 and permitted by this Court to be withdrawn on December 1, 1977).

285 A.2d 448, 450 (1971).[7] However, the guilty plea colloquy between the trial judge and appellee concededly falls below the standards set forth in Ingram; although appellee had a general understanding of the nature of the charges against him, nowhere during the proceeding was he provided with an outline of the legal elements of the various degrees of criminal homicide in understandable terms.[8] In this case we

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7/ For examples of guilty pleas which were accepted after colloquies similar to the one in the instant case and which we sustained on appeal, see Commonwealth v. Hollenbaugh, 449 Pa. 6, 295 A.2d 78 (1972); Commonwealth v. Martin, 445 Pa. 49, 282 A.2d 241 (1971).

8/ This is not to suggest that pre-Ingram guilty pleas were inherently unfair. Although judging a single guilty plea under both pre-Ingram and post-Ingram standards may produce contradictory results, the only distinction between these standards is one of form and not one of fairness: pre-Ingram, as well as post-Ingram guilty plea colloquies satisfy the mandates of due process. See Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969); Commonwealth v. Jenkins, 449 Pa. 398, 296 A.2d 926 (1972).

are asked by the Commonwealth to reexamine this Court's holding in Minor, which compelled the court below to allow appellee to withdraw his otherwise valid guilty plea.

The Commonwealth relies upon three factors - Rule 319(a), the practice of the courts before Ingram, and decisions of the Superior Court after Ingram - to support its assertion that Ingram did, in fact, create a new rule of criminal procedure.[9/] This position has considerable merit.

Prior to the decision in Ingram, the comments to Rule 319(a) merely recommended that the judge ask questions to ascertain whether the defendant had an understanding of the nature of the charges to which he

9/ This Court possesses the power to prescribe general rules governing procedure in the courts. Pa. Const. art. 5, Sec. 10(c).

was pleading guilty. Commonwealth v. Ingram, 455 Pa. at 204 n.5, 316 A.2d at 81 n.5. Those comments never suggested, much less required, that the record of a guilty plea must contain an outline of the specific legal elements of the crime charged. As a consequence, courts accepting guilty pleas sought to ensure simply that the defendant had a general understanding of the nature of the offense, and this Court affirmed the validity of such guilty pleas on appeal. 10/

10/ See cases cited note 7 supra. With respect to the nature of the crime to which he was pleading guilty, in Commonwealth v. Hollenbaugh, the defendant was told:

> (Y)ou would be admitting that you took the lives of these two named persons ... with the intent to kill. The crime to which you would be entering a plea would be murder generally, and this would be murder in the second degree ....
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> * * * * *

(Fn. 10 contd., lower margin, next page.)

It was not until the decision in Ingram that trial courts were required to outline,

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(Fn. 10, contd. from last page.)

> (I)f the Commonwealth produced evidence of first degree murder, that is, killing with the intent to kill, with premeditation, time to plan and forming the design ... the Court could impose sentence.
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> * * * * *
>
> (I)f the evidence has sufficient mitigating testimony, ... the Court may find voluntary manslaughter.

449 Pa. at 10-11 n.2, 295 A.2d at 80-81 n.2. In Commonwealth v. Martin, the court informed the defendant:

> (B)efore you enter any plea of guilty to murder generally ...: As you stand here, you are aware that you are charged as an accomplice ... in (a) murder?
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> * * * * *
>
> (Y)ou could let the Commonwealth certify ... the degree of the crime does not exceed second-degree murder .... I, the Court, then have the duty of determining whether you are guilty of murder in the first degree, murder of the second degree, or voluntary manslaughter.

455 Pa. at 54-55 n.2, 282 A.2d at 244 n.2.

on the record, the legal elements of the offense charged, or that failure to comply with this requirement constituted grounds for the withdrawal of a guilty plea. See, e.g., Commonwealth v. Tabb, 477 Pa. 115, 383 A.2d 849 (1978); Commonwealth v. Kulp, 476 Pa. 358, 382 A.2d 1209 (1978). In view of the magnitude of the changes brought about by Ingram - the establishment of new procedures for the acceptance of guilty pleas and the creation of new grounds for the withdrawal of guilty pleas - we can only conclude that the holding of Ingram constituted a new rule of criminal procedure - in effect, an amendment to Rule 319(a).[11/]

11/ This conclusion is supported by opinions of the Superior Court rendered before this Court's decision in Minor, which stated that "prior case law did not expressly require such a colloquy," and that "Ingram should only apply to guilty plea colloquies conducted after January 24, 1974, the date of the Ingram decision." Commonwealth v. Hanna, 230 Pa. Super. 194, 197, 198,

(Fn. 11 contd., lower margin, next page.)

Having determined that Ingram did create a new rule of criminal procedure, we must determine whether it controls in this case. Court-made rules of procedure do not generally apply retroactively: when the circumstance motivating a new rule "is not one of constitutional proportions, a rule will be wholly prospective ...." Commonwealth v. Milliken, 450 Pa. 310, 315, 300 A.2d 78, 81 (1973). Although Ingram did establish a new rule of criminal procedure, its holding was not constitutionally mandated. The opinion in Ingram failed to mention a single constitutional principle or cite a single case in which the United States

(Fn. 11 contd. from last page.)
326 A.2d 538, 540 (1974). Accord Commonv. Schorck, 230 Pa. Super. 411, 326 A.2d 878 (1974), aff'd on other grounds, 467 Pa. 248, 356 A.2d 355 (1976); Commonwealth v. Turman, 230 Pa. Super. 356, 326 A.2d 891 (1974).

Supreme Court established specific procedures to ensure a defendant's understanding of the nature of the charges against him. It was not until the subsequent decision in Minor that this Court first attempted to explain Ingram on constitutional grounds, and that after-the-fact explanation was less than compelling: the case relied upon by the majority, Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969), simply held, without imposing any particular procedural requirements, that due process requires the record of a guilty plea to disclose that the defendant is entering his plea voluntarily and understandingly, and that is precisely what this Court's cases prior to Ingram required. See, e.g., Commonwealth v. Mears, 454 Pa. 222, 311 A.2d 615 (1973); Commonwealth v. Roundtree, 440 Pa. 199, 269 A.2d 709 (1970).

Since Ingram did create a new rule of procedure, although not one of constitutional prescription, it follows that the rule should have no effect on guilty pleas which were accepted before January 24, 1974, the date of the decision in Ingram and the contrary holding of Minor is error.

The overwhelming majority of all convictions result from guilty pleas. Commonwealth v. Godfrey, 434 Pa. 532, 536, 254 A.2d 923, 929 (1969). Consequently, allowing guilty pleas like the one here in question to be withdrawn on purely technical grounds would indeed have a negative effect on our system of criminal justice. The guilty plea in this case was valid on both form and substance when it was accepted in 1971; to allow the withdrawal of such a plea would permit a criminal defendant to flaunt, in the face of the trial court, that court's failure to comply with rules of procedure that were not then in existence, and it would

leave the trial court to question its efforts in the administration of justice, in the face of sweeping decisions which undermine its plea proceedings because of the inability to predict changes in the law years before they occur. In view of these considerations and our conclusion that the holding in Minor is erroneous, we would overrule Minor and reinstate appellee's guilty plea.

Since the two remaining issues in appellee's petition to withdraw his guilty plea are so blatantly meritless, we will, in the interest of judicial economy, dispose of them herein, rather than remanding the case to the lower court for further proceedings, and possibly creating the need for further appellate review.

Appellee additionally alleged in his petition that the judge's failure to inform him of the elements of the crime to which he pleaded guilty violated his right to due process under the fourteenth amendment.

In Henderson v. Morgan, 426 U.S. 637, 647 & n.18, 96 S. Ct. 2253, 2258 & n.18, 49 L. Ed.2d 108 (1976), the Supreme Court of the United States held that due process requires that the defendant receive adequate notice of the critical elements of the offense to which he is pleading guilty. That Court did not, however, hold that notice of the critical elements of the crime had to appear on the record, stating:

> even without such an express representation (by defense counsel, on the record, that the nature of the offense has been explained to the accused), it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

Id. at 647, 96 S. Ct. at 2258.

In Henderson, this presumption was overcome because the trial judge found as a fact that, although the appellant had been represented by counsel when he pleaded guilty

to murder of the second degree, the element of intent had never been explained to him. In this case, however, it is "appropriate" to presume that appellee's counsel explained to him the nature of the offense charged in sufficient detail to give him notice of the critical elements of that offense. Appellee has never alleged that his attorney was ineffective in representing him or, more specifically, that his attorney failed to discuss with him the nature of the crimes charged. In view of appellee's admitted satisfaction with his counsel, we hold that appellee is presumed to have received notice of the crimes charged in compliance with the mandates of due process. As stated before, this allegation is meritless.

Finally, in his petition appellee alleged that because he had an inexact recollection of the evening of the killing, the court "erred in failing sua sponte to

order a hearing on the issue of whether (he) was on October 4, 5 & 6, 1971 competent to stand trial at all, much less to plead guilty ...."

The fact that a defendant has an "inexact recollection" of the events surrounding the crime with which he is charged has no bearing on his competence to plead guilty, and it certainly imposes no duty upon the judge accepting the plea to question the defendant's competence sua sponte. Rather, competence to plead guilty depends upon whether the defendant has "the ability to comprehend his position as one accused of (murder) and to cooperate with his counsel in making a rational defense" and whether he has "sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding of the proceedings against him." Commonwealth v. Turner, 456 Pa. 309, 320 A.2d 113, 114 (1974)(citations omitted). Again, this position is meritless.

The order of the Court of Common Pleas of Allegheny County granting appellee's petition to withdrawl his guilty plea is reversed and the petition is dismissed.

ROBERTS, J., files an Opinion concurring in the judgment in which O'BRIEN, C.J., and NIX, J., join.

OPINION CONCURRING IN THE JUDGMENT

ROBERTS, Judge.

The trial court was correct in its substantive determination that appellee's guilty plea colloquy violated the requirements of Commonwealth v. Minor, 467 Pa. 230, 356 A.2d 346 (1976). However the trial court must be reversed because the court committed procedural error in failing to dismiss appellee's challenge to his guilty plea colloquy as untimely.

Commonwealth v. Minor Remains Controlling Law

The opinion of Mr. Justice Larsen,

which commands the votes of only three of six justices, does not reflect the view of a majority of the Court. Where, as here, the Court is equally divided on whether a previous holding should be overruled, that holding retains its full force and effect as existing law. Thus, the holdings of Commonwealth v. Minor and cases applying Minor are undisturbed and remain controlling law. See Neil v. Biggers, 409 U.S. 188, 192, 93 S. Ct. 375, 378-79, 34 L.Ed.2d 401 (1972) (equally divided court not entitled to precedential weight); Ohio ex rel. Eaton v. Price, 364 U.S. 263, 264, 80 S. Ct. 1463, 1464, 4 L.Ed.2d 1708 (1960)(same); Commonwealth v. Holly, 483 Pa. 371, 375, 396 A.2d 1215, 1217 (1979)(judgment of equally divided Court not final for purposes of Post-Conviction Hearing Act); Commonwealth v. Rightnour, 469 Pa. 107, 110, 364 A.2d 927, 928 (1976)(subject matter in dispute undisturbed where "no majority can be mustered to do

otherwise").

Appellee's Challenge to His Guilty Plea Is Untimely

On this record which clearly evidences that appellee's challenge to his guilty plea is untimely, there is no reason for the opinion of Mr. Justice Larsen to discuss, let alone attempt to overrule, this Court's holding in Commonwealth v. Minor, supra, and the several other cases which have applied Rule 319(a) to guilty pleas pre-dating Commonwealth v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974). See Commonwealth v. Mack, 466 Pa. 12, 351 A.2d 278 (1976); Commonwealth v. Dilbeck, 466 Pa. 543, 353 A.2d 824 (1976); Commonwealth v. Schorck, 467 Pa. 248, 356 A.2d 355 (1976); Commonwealth v. Hunter, 468 Pa. 7, 350 A.2d 785 (1976); Commonwealth v. Ramos, 468 Pa. 404, 364 A.2d 257 (1976); Commonwealth v. Veltre, 475 Pa. 285, 380 A.2d 356 (1977); Commonwealth v. Zakrzewski, 485 Pa. 532, 403 A.2d 516 (1979).

The present petition to withdraw a guilty plea entered in 1971 in no respect alleges either that appellee was unaware of his appellate rights or that counsel was ineffective for failing to pursue appelle's desire to challenge the plea. Thus, the petition, filed six years after plea and sentence, is untimely and should have been dismissed by the trial court. See Commonwealth v. Miller, ____ Pa. ____, ____ A.2d ____ (1981).

O'BRIEN, C.J., and NIX, J., join in this opinion.

THE SUPREME COURT OF PENNSYLVANIA
Western District

Carl Rice, Esq.
Prothonotary
Irma T. Gardner
Deputy Prothonotary

901 City-County Bldg.
Pittsburgh, PA 15219

April 21, 1981

Paul H. Titus, Esq.
TITUS MARCUS & SHAPIRA
624 Oliver Building
Pittsburgh, PA 15222

In Re: Commonwealth v. John Paul Minarik,
No. 80-1-90

Dear Mr. Titus:

The Court has entered the following order on your Application for Reargument:

"April 17, 1981
Application Denied.
Per Curiam"
Mr. Justice Wilkinson did not participate in the decision or consideration of this case.

Very truly yours,
s/ Irma T. Gardner/s
DEPUTY PROTHONOTARY

ITG:ml
cc: Paul Bogdon, Esq.
Robert L. Eberhardt, Esq.
Charles D. Nelson, Esq.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

V.

JOHN PAUL MINARIK

CRIMINAL DIVISION

No. 2186 March Term, 1971

OPINION AND ORDER OF COURT

ZAVARELLA, J.

Code No. _____

Counsel of record:

For the Commonwealth:
Robert Colville, D.A.
Robert A. Zunich, Asst. D.A.

For the Defendant:
Paul Bogdon, Esq.

O P I N I O N

ZAVARELLA, J.

On October 4, 1971, defendant entered a plea of guilty to an indictment containing charges of murder and voluntary manslaughter. The plea was a general plea.

The following is the record of the proceedings on that day.

October 4, 1971 - 11:10 A.M. Defendant present in Open Court.

* * *

THE CLERK: John P. Minarik, please come forward.

(Defendant comes forward.)

THE COURT: I address this question to you, and in all these questions that I will subsequently address to you, if you do not understand the import of the question, you may consult with your counsel. However, these answers must be yours, not those of your counsel. You may, however, consult with him.

Now, the first question I have for you: are you John P. Minarik?

THE DEFENDANT: Yes, sir.

THE COURT: Under the Rules of Criminal Procedure in a matter such as this where you are charged with the First Count of murder and Second Count of Voluntary manslaughter, it is provided that the arraignment shall take place in open court and shall consist of the reading of the indictment to the Defendant and calling upon the Defendant to plead thereto. This Court is opened this

in the Assignment Room before Judge Lewis. The door to this courtroom is open although I have not called the jurors down to this room, but this is for purposes of a rule, open court. You are the Defendant. The clerk in this case, Mr. Plocki, will read to you from the indictment in this case which lists the charges against you. I want you to listen carefully to what is read to you. Some of the language in here is somewhat quaint. If you do not understand what is said, you may consult with Mr. Cappy or you may await until later when the Court will further explain the matter to you.

Mr. Plocki, you will now read the indictment and conduct the arraignment.

(The indictment was read to the Defendant by the clerk.)

THE CLERK: How do you plead, are you guilty or not guilty of the felonies wherewith you stand charged?

THE DEFENDANT: I wish to plead guilty.

THE CLERK: Generally?

THE DEFENDANT: Generally.

THE CLERK: The defendant, with counsel present, having been duly arraigned pleads guilty generally to the charges preferred in the indictment.

THE COURT: Mr. Minarik, the Court is now going to pose to you certain questions and before these questions are propounded to you, I am going to ask Mr. Plocki to swear you in, so will you please raise your right hand.

* * *

JOHN PAUL MINARIK, the Defendant, having been first duly sworn, was interrogated as follows:

INTERROGATION

BY THE COURT:

Q. Now it is required under the law that the Court should conduct an on-the-record examination of a Defendant who has offered to the Court a plea of guilty, so I am going to ask you certain questions which will meet the requirements of the law that the examination be done on the record.

Now, again, your name is?

A. John Minarik.

Q. How old are you?

A. Twenty-three.

Q. What has been the extent of your formal education?

A. I have completed four years and some odd months of college at Carnegie Tech. I have a Bachelors of Science

degree in mechanical engineering. I started towards a Masters degree in mechanical engineering.

Q. What was your occupation before you were confined in prison?

A. I was employed by United States Steel Corporation as an engineering trainee at Irvin Works.

Q. Mr. Minarik, you have just been arraigned on an indictment which charges you with murder in the First Count and voluntary manslaughter in the Second Count, and you have just stated that you wish to plead guilty generally to these charges. Before the Court will act upon your offer to plead guilty, before the Court will accept such a plea, we want to make certain that you fully understand what you are doing, why you are doing it, and what the consequences may be. You are advised by the Court that a plea of guilty operates as a waiver of all the constitutional, statutory and judicially created safeguards afforded the Defendant in a trial to determine his guilt or innocence. Do you understand that?

A. Yes.

Q. A plea of guilty you are advised has an extraordinary effect. It has a different purpose and effect than a mere admission or a confession outside of the court. It is in itself a conviction. Do you understand that?

A. Yes.

Q. It is, like the verdict of a jury, conclusive. Do you understand that?

A. Yes.

Q. Upon the acceptance of a plea of guilty, nothing more is required of the Court. The Court has nothing to do but to give judgment and sentence. Do you understand that?

A. Yes.

Q. Then you do understand that the purpose of this questioning is to determine whether you understand the meaning of the charges and the consequences of pleading guilty. Do you understand this as the purpose of this interrogation?

A. Yes, sir.

Q. The Commonwealth charges in this indictment that on the 7th day of February, 1971, you unlawfully and feloniously caused the death of one Rosemary Kacsuta, that she died as a result of injuries inflicted by you. Did you participate in the acts which caused the death of this victim as charged in this indictment?

A. I am sure up to a certain point that --

MR. CAPPY: May I interrupt, your Honor.

THE COURT: If you desire, you may consult with your counsel at this time.

MR. CAPPY: I would ask for the record, your Honor --

* * *

BY MR. CAPPY:

Q. Do you remember exactly what happened on the evening of February 7, 1971?

A. Not completely.

Q. There are parts of that evening which you cannot recall to this day; is that true?

A. Yes, sir --

Q. His Honor asked you if in your own mind do you know and are you sure that you did participate in the acts which his Honor has described and which the indictment charges you?

A. Yes.

THE COURT: Speak up loudly so the reporter and counsel may hear this.

THE DEFENDANT: Yes.

BY MR. CAPPY:

Q. You seem to have an equivocation as to whether or not your answer in the affirmative is the proper answer. Do you hesitate because you do not remember every instance of that evening?

A. Yes.

Q. I see. You and I have consulted on many prior occasions as to what occurred on that evening; is that true?

A. Yes.

Q. And I have informed you totally as to the evidence which the Commonwealth has?

A. Yes.

Q. And you have consulted with a number of psychiatrists on the particular events which took place on February 7, 1971; is that true?

A. Yes.

Q. And even with their consultation, you have been unable to recall the exact events of that evening; is that true?

A. Yes.

* * *

BY THE COURT:

Q. Mr. Minarik, some time has elapsed since the 7th day of February, 1971, you have had time to consider this matter and acquaint yourself with all the relevant information and the Court asks of you this question again: did you, in fact, cause the death ofRosemary Kacsuta on the date in question? Did you particpate (sic), did you cause her death as charged in this indictment?

A. Yes.

Q. Do you understand that by pleading guilty, that you are admitting that you are guilty of murder of the second degree and are admitting that there is sufficient evidence to find murder of the second degree?

A. Yes.

Q. You are advised that if the plea is accepted by the Court, a hearing will be held by the Court without a jury, at which time the Commonwealth will present such evidence as it has concerning the matter set forth in the indictment? Do you understand that?

A. Yes.

Q. It is possible that the Court may find the Defendant guilty, that is, may find you guilty of murder of the first degree instead of murder of the second degree; but in order to raise the finding of murder of the first degree, the burden is upon the Commonwealth to prove that the events meet the requirement of first degree murder. Do you understand that?

A. Yes, sir.

Q. In other words, the Commonwealth has the burden of proving the elements of first degree murder, that it was a willful, deliberate, and premeditated murder. Do you understand that?

A. Yes, your Honor.

Q. You are further advised that at the hearing you may also present evidence and depending upon such evidence, it is possible for the Court to find you guilty of voluntary manslaughter instead of second degree murder; but in order to lower the finding of guilt to voluntary manslaughter, the burden is upon the Defendant to prove that the offense amounts only to voluntary manslaughter. Do you understand that?

A. Yes, sir.

Q. Mr. Minarik, do you understand by you have the right to a trial by a jury of twelve persons under our Constitution and that this valuable right is waived by a plea of guilty which is accepted by the Court?

A. Yes, your Honor.

Q. Mr. Minarik, do you understand that you are presumed innocent until found guilty by a jury, or following a plea of guilty and a hearing, you are found guilty by the Court of murder of the second degree, murder of the first degree, or voluntary manslaughter. Do you understand that?

A. Yes, sir.

Q. Mr. Minarik, you are hereby advised that the law provides for the following types of punishment for the offense which I shall designate for you. The law provides that murder of the first degree is punishable by life imprisonment or death. The law provides that murder of the second degree is punishable by a sentence of ten to twenty years in prison. The law further provides in the case of voluntary manslaughter for a sentence of from six to twelve years in prison. Now, do you understand the range of the permissible sentences as just stated to you by the Court?

A. Yes.

Q. Mr. Minarik, is there any plea bargain, discussion, arrangement or promise between your counsel, Mr. Cappy, and the District Attorney as to the sentence in this case?

MR. CAPPY: Your Honor, if I may, may I interject a comment here?

THE COURT: Well, perhaps you want to consult with your client first.

(Mr. Cappy consulted with the Defendant privately and off the record.)

MR. CAPPY: Your Honor, if I may just make a statement. I have informed Mr. Minarik that Mr. Fisher and I have had a consultation whereby we agreed that should Mr. Minarik enter a general plea to murder and should the degree rise to first degree murder after you have heard all the evidence, that Mr. Fisher then would not -- and if I state this correctly -- would not ask for the death penalty, thus leaving the record complete. I have also informed Mr. Minarik that there has been discussion among Mr. Fisher and myself and his Honor with reference to the nature of the crime involved and what my feelings were, what Mr. Fisher's feelings were on it. However, I have told Mr. Minarik that any bargain or any promise that I may have made or I did, in fact, make is not binding on his Honor and by the law you cannot be bound by anything we have said prior to this hearing right here.

BY THE COURT:

Q. You have just heard your counsel state what the extent has been of the discussions, arrangements and conversations with the District Attorney. Do you understand what he has just said?

A. Yes, sir.

Q. As far as this is concerned, the Court has not participated in any discussion beyond except for the fact that counsel has advised the Court of the nature and the circumstances of the offense which is charged here in the indictment. They have emphasized to the Court the gravity of the offense and they have set forth for the Court their opinions and their attitudes with respect to the crime charged to you. As Mr. Cappy has said, you are advised that this Court is not bound by any bargain or promise or recommendation, whether it comes from the District Attorney or defense counsel. Do you understand what I have just said to you?

A. Yes, your Honor.

Q. Mr. Minarik, has anyone made any promise or any threat to you or has anyone exercised any coercive force upon you with respect to this matter which is here upon trial?

A. No.

Q. Have you indulged in alcoholic beverages within the last twelve hours?

A. No, your Honor.

Q. Have you taken any medication or used any drugs within the last twenty-four hours?

A. No.

Q. Have you any mental or physical ailments that you know of at this time?

A. Not that I know of, your Honor.

Q. Mr. Cappy is known to the Court as a competent lawyer. He has represented you over a period of time. Over how long a period of time did this representation or this relationship exist?

A. I have met Ralph Cappy in March of 1971 when he came to counsel me and I have met with him on frequent occasions, sometimes short for a few minutes and sometimes for maybe fifteen or twenty minutes.

Q. He has served as your counsel, though, since your meeting with him in March; is that correct?

A. Yes, and recently he sat down with me and counseled me at greater lengths.

Q. Have you had ample opportunity to discuss this matter with Mr. Cappy?

A. Yes, I have had enough time to talk with Ralph Cappy.

Q. Will you advise the Court whether you are satisfied with the legal services rendered to you by Mr. Cappy to this day?

A. Your Honor, I am more than satisfied with Ralph Cappy's efforts on this case, what he's tried to do and what he'd tried -- I'd say search out, and I am satisfied with my counsel.

Q. Is your desire to enter a plea of guilty as you have offered to the Court the product of your own free will? Is it the exercise of your own choice in the matter?

A. Yes.

Q. Mr. Minarik, do you understand everything that this Court has said to you during this interrogation?

A. Yes.

Q. Do you have any questions about the subject matter of this preliminary inquiry?

(The defendant conferred privately with Mr. Cappy off the record.)

A. No further questions.

Q. Do you desire to say anything further to the Court at this time with respect to this matter of considering your offer to plead guilty to the charges contained in the indictment?

(The Defendant conferred privately with Mr. Cappy off the record.)

Q. I should say to you so you will understand the import of that question it refers only to the matters here involved, the Court will, if it accepts your offer to plead guilty, allow you an opportunity to present evidence bearing on the matter under investigation. I refer now only to those preliminary questions which attempt to search out whether this is being done knowingly and understandingly and in an intelligent fashion. Do you desire to say anything further at this time with respect to that aspect of the case?

A. My plea was entered voluntarily by myself. I understand.

THE COURT: All right. Is there anything that the District Attorney wishes the Court to ask the Defendant beyond those matters which have been posed to the Defendant?

MR. FISHER: No, your Honor, not at this time.

THE COURT: All right. Based upon the answers given by the Defendant to the questions presented by the Court to him, the Court is satisfied that the offer to plead guilty generally to the charges in the indictment is competently and intelligently made. The Court, therefore, accepts the offer to plead guilty and the Court directs the clerk to endorse this plea on the back of the indictment.

Mr. Minarik, you will be asked after the clerk has prepared this in written form to read it over with your counsel; and after that, if you understand it and it is still your desire to plead guilty, you will be asked to sign the written plea. All right. You may for the moment sit at counsel table until Mr. Plocki prepares the pleas.

(Few minutes recess.)

(The Defendant signs said plea in open court.)

MR. CAPPY: Did you wish him to come back forward, your Honor?

THE COURT: The Court directs the written plea be filed with the records of this case.

Mr. Fisher, we are ready to hear the Commonwealth's evidence in this matter.

MR. CAPPY: Your Honor, before we proceed, I would like to make a statement for the record if I may. In the papers his Honor will find, and I

think for future reference and for the record, that there is a petition to withdraw as counsel. I think that deserves some explanation here although I am sure the Court is aware of what happened. This petition was filed by John J. Dean, Esq., Chief Appellate Attorney in the Office of the Public Defender of Allegheny County. I am employed by the same office as a trial defender. On June 10, 1971, the petition to withdraw as counsel was filed. I want to assure the Court, and I have already assured Mr. Minarik, that I personally had nothing to do with this application to withdraw. It is merely a formal process in our office when an accused comes to our office in a position which our office feels is not an indigent position qualifying him under the Public Defender Act, then our office will as a matter of course file the necessary petition to withdraw. As I understand this proceeding, I was not in Pittsburgh at the time, I understood the proceedings were denied or application was denied by his Honor, Judge Van Der Voort, and that should explain that petition. It is not any conflict between Mr. Minarik and myself. I would further like to state for the record that various motions were filed in this case, including an application for pretrial discovery and inspection under Rule 310 of the Pennsylvania Rules of Criminal Procedure, and I

would like to state for the record Mr. Fisher has been more than fair in cooperating with me on the pretrial discovery of this case. He has permitted me to view the evidence. He has told me of the nature of his evidence and what he would present during a trial by jury or a guilty plea hearing. He has voluntarily without Order of Court given me a list of witnesses as per my request in the application. The various points where Mr. Fisher and I came into conflict on this application really aren't of any importance to the trial of this case, such as the statements witnesses made to him and the psychiatric report from the Behavior Clinic, a copy of which Mr. Fisher wasn't provided. There has been a full cooperation between myself and Mr. Fisher; and so for any future reference, I would like that stated on the record. Thank you, your Honor.

MR. FISHER: Let the record just indicate that on the 9th of June, 1971 -- that I am not sure of the signature, I think it is Judge Van Der Voort's -- that the Public Defender was permitted to withdraw as counsel on this case but sometime later in the summer, after a further hearing which Mr. Minarik or some evidence was presented at least by the court coordinator, the Public Defender was then reassigned to the case prior to the time it was scheduled in September.

THE COURT: All right. I think perhaps the record should also show that this case was scheduled for June 7 and September the 13th before being listed for trial today; and as I recall it, this member of the Court signed an Order continuing the case to allow the Defendant to obtain the services of a psychiatrist and do other matters in advance of trial.

Is that not correct?

MR. CAPPY: That is absolutely correct, your Honor.

THE COURT: All right. Mr. Fisher, call your first witness.

(Commonwealth's Exhibits Nos. 1-A through 1-M and 2 were marked for identification.)

The Court then proceeded to hear testimony. Following Commonwealth testimony, the Court received testimony from defendant; adjourned, and then after deliberation found defendant guilty of murder of the first degree. Defendant was sentenced to undergo imprisonment for life. The record of these proceedings was developed October 4, 5 and 6, 1971.

On May 31, 1977, defendant filed a petition to withdraw his plea of guilty. The Commonwealth filed a motion to dismiss which was denied by the Court, the Commonwealth being further directed to file an answer to the petition to withdraw. At the request of the trial judge and with the concurrence of counsel, the matter was scheduled for hearing before this Court January 17, 1978. Following this date and after subsequent proceedings, three questions were presented:

1. Did defendant waive in any way his right to withdray the plea?

2. If not, may the Commonwealth introduce testimony outside of the record testimony to establish that the plea was valid?

3. Was the plea colloquy conducted by the trial judge sufficient?

As to the first question, the defendant did not waive. Commonwealth v. Starr, 450 Pa. 485, 301 A.2d 592 (1973); Commonwealth v. Lee, 460 Pa. 324, 399 A.2d 104 (1979). A showing of prejudice on the order of manifest injustice is, however, required before withdrawal is properly justified. Defendant here alleges such manifest injustice as to make Judge Ridge's Order denying the Commonwealth's motion to dismiss proper. The Court had the power to adjudicate the petition.

As to the second question, it is held that the Commonwealth is bound to proceed solely on the basis of the on-the-record colloquy. It is the trial court that must be satisfied the standards for accepting the plea have been met. This occurs in court, on the record, and

in the presence of all parties. To permit an attorney to later testify, as is offered here, as to what he told his client concerning the standards for accepting a guilty plea amounts to a second chance to either sustain the plea or reject it and takes away the necessary independent judicial determination that the defendant understood and admits the crime charged according to the necessary legal requirements.

As to the third question, in 1974 the Supreme Court of Pennsylvania decided Commonwealth v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974). In Ingram, the Court held in order to demonstrate a defendant's understanding of the crime charged, that the record must show that the elements of the crime were outlined to the defendant in understandable terms. Moreover, a defendant accused of murder

is entitled to an explanation of the elements of murder with an eludidation of the term malice. From this, defendant argues that the colloquy did not define murder, or voluntary manslaughter, nor did it attempt to set forth the critical element of malice, much less explain it to defendant and as such, the withdrawal of the plea is mandated, particularly in view of Commonwealth v. Minor, 467 Pa. 230, 356 A.2d 346 (1976). Defendant in effect argues that the law developing from Minor is that defendants who entered pleas prior to Ingram may now challenge their pleas even though the colloquies might have met all other pre-Ingram standards.

In Minor, as here, the guilty plea was entered prior to the decision in Ingram. The trial judge did not explain the elements of the crimes charged or the relationship between the elements and the facts of the Minor case. After sentencing, Minor appealed to the Superior Court alleging that his guilty pleas could not have been knowing and intelligent since he lacked an understanding of the specific elements of the crimes charged. The Superior Court reversed the conviction, not on the basis of Ingram, but because even pre-Ingram standards and the requisites of Rule 319(a) had not been met. The Supreme Court affirmed on further appeal by holding that Ingram required an explanation of the specific elements of the crimes charged and also that Ingram

announced no new law concerning standards for guilty plea colloquies. The issue of retroactivity was not reached. Instead, the Superior Court was affirmed on the basis that the elements of the crimes charged were not specifically explained to the defendant on the record. This holding has caused the legitimate concern of all persons involved in the criminal justice field. The concern is this, prior to Ingram the law had been that a mere understanding of the elements of the offense charged, without any specific explanation, was sufficient for an intelligent, knowing and voluntary guilty plea. If, after Ingram, the trial judge must explain to the defendant the specific elements, is not this arguably new law? Justice Pomeroy in his Minor dissent would so hold even to the effect that the

majority in Minor erred by putting a general understanding of the nature of the crime on equal standard with an outline of the specific legal elements.

In Commonwealth v. Zakrzewski, ____ Pa. ____, 403 A.2d 516 (1979), the problem again arose. Defendant entered a plea of guilty to murder generally on June 13, 1973. After sentence, on direct appeal, the Supreme Court affirmed. On Post Conviction appeal, defendant claimed that his guilty plea was a nullity because the plea colloquy did not comply with Rule 319(a) and Ingram. Defendant claimed, inter alia, he was not informed of the elements of the charge of murder. The Supreme Court awarded a new trial.

"A study of the record of the guilty plea proceedings confirms Zakrzewski's claim that the plea colloquy did not comply with the standards mandated by Commonwealth v. Ingram, supra. The Commonwealth does not dispute this, but contends the plea colloquy 'was adequate by the legal standards in effect as of June 13, 1973,' the date the plea was entered. However, one of the readily apparent difficiencies in the plea colloquy is its failure to show before the plea was accepted that Zakrzewski had an understanding of the nature and elements of the charge against him. Even before Ingram, supra, and, more specifically, on June 13, 1973, an understanding of the offense charged was necessary to an intelligent and knowing guilty plea. See Commonwealth v. Minor, 467 Pa. 230, 356 A.2d 346 (1976)."

supra, p. 517

In Commonwealth v. Brown, ___ Pa. Super. ___, 410 A.2d 366 (1979), the plea

to murder was entered June 21, 1973. On direct appeal, the sentence of life was affirmed. On Post Conviction appeal by the Commonwealth, the finding of the lower court that the colloquy was defective because it failed to apprise defendant of the elements of murder was affirmed by the Superior Court.

> "In Commonwealth v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974), the Supreme Court held that 'the record colloquy under Rule 319(a) must include a demonstration' that the defendant understands the nature of the charges..." (Citations omitted...Thus, for an examination to demonstrate defendant's understanding of the charge, the record must disclose that the elements of the crime or crimes charged were outlined in understandable terms.' 455 Pa. at 203, 316 A.2d at 80.

"The Commonwealth, nevertheless, argues that the Ingram standard is inapplicable to the instant case because appellee's guilty plea has been entered before Ingram, however, did not establish new law. It merely reaffirmed existing law in more articulate terms. Commonwealth v. Minor, 467 Pa. 230, 356 A.2d 346 (1976). The Supreme Court stated recently in Commonwealth v. Zakrzewski, 485 Pa. 532, 403 A.2d 516 (1979), that 'even before Ingram...an understanding of the offense charged was necessary to an intelligent and knowing guilty plea.' See also: Commonwealth v. Minor, supra. The colloquy conducted on June 21, 1973 in the instant case failed to meet this requirement."

supra, pp. 367-68.

In Commonwealth v. Foster, ___ Pa. Super. ___, decided March 21, 1980, the plea was entered one week before Ingram. No attempt was made to explain to appellant the elements of the charges against him. A new trial was ordered. In footnote "6" the Court stated:

"We note that appellant's plea was entered a week before the Supreme Court handed down its decision of Commonwealth v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974), in which the Court ruled that a guilty plea colloquy must be conducted on the record. Nevertheless, subsequently, in Commonwealth v. Minor, 467 Pa. 230, 356 A.2d 346 (1976), the Court made it clear that Ingram made not law concerning the substance of such a colloquy, since even prior to Ingram an accused's understanding of the nature and elements of the charges against him was essential to the validity of a guilty plea."

The above cases are to be read with Commonwealth v. Brewer, ___ Pa. ____, 388 A.2d 1071 (1978),

"The colloquy, while defective by today's standards, must be evaluated by standards in effect in 1959 when the plea was entered.[2] At that time a defendant who was represented by counsel at a guilty-plea hearing was presumed to have entered a knowing and voluntary plea. The burden of proving otherwise rested on the defendant. Commonwealth v. Alston, 473 Pa. 40, 373 A.2d 714 (1977); Commonwealth v. Hubbard, 462 Pa. 571, 342 A.2d 81 (1975); Commonwealth ex rel. Crosby v. Rundle, 415 Pa. 81, 202 A.2d 299 (1964). The standard for determining the validity of a guilty

plea entered at that time is that the plea must have been voluntarily, knowingly, and intelligently made by the defendant, with an understanding of the charges against him, of the constitutional rights being waived; and of the consequences of his plea. Commonwealth v. Alston, supra.

"However, in Commonwealth ex rel. West v. Myers, 423 Pa. 222 A.2d 918 (1966), we noted that because the cases had not prescribed a fixed procedure for determining a defendant's understanding of his plea, convictions based on guilty pleas would not be disturbed merely because the court had failed to examine the defendant at the time it accepted his plea. Rather, the defendant's understanding would be treated as a factual issue to be resolved on a case-by-case basis.

> "2. Commonwealth v. Minor, 467 Pa. 230, 356 A.2d 346 (1976) held that Commonwealth v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974) announced no new requirements for on-the record colloquies, but Minor does not expressly state when the Ingram standard became law in Pennsylvania. Clearly, the Ingram standard, which requires that the elements of the crimes charged be explained on the record to a defendant who is about to plead guilty, was not in effect in 1959."
>
> supra, p. 1075.

and with Commonwealth v. Lee, ____ Pa. _____, 399 A.2d 104 (1979). In Lee, after Ingram, the trial judge did not explain the elements of intent to kill or malice. Since the plea in Lee was no higher than second degree, the plea was permitted to stand.

> "While demonstration of specific intent to kill and of malice are prerequisites to sustain a conviction of murder of the first degree, proof of these elements is not needed to support a finding of felony murder. (citing cases)"
>
> p. 109.

On the record, there was no hesitancy in finding that appellant was fully and in understandable terms informed of the nature of the charges against him as well as the basis for the charges*

In a Lee dissent, Justice Roberts stated:

> "In the absence of an on-the-record explanation of the nature of the charges...it cannot be concluded that the plea was entered voluntarily, intelligently, knowingly and understandingly. (citing cases)"
>
> p. 111.

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* To the same effect, see Commonwealth v. Dyas, ___ Pa. Super. ____, 397 A.2d 434 (1979).

Justice Roberts would explain elements of all degrees of murder.

As to only the explanation of malice, Commonwealth v. Hare, ___ Pa. ____, 404 A.2d 388 (1979), is applicable.

> "Appellant contends that the trial court, at the plea colloquy, did not explain the meaning of malice or that it was an element of murder of the first degree. At the colloquy, the court stated:
>
> > 'Now, you understand of course that the charge here is criminal homicide and by entering a plea of guilty, you are admitting that you did take the life of another, that your act was the cause of death and that you did this without any of the defenses that would otherwise be available and this of course constitutes the knowing cause of death of another human being.'

"This statement did not inform appellant of the nature of malice. Malice will be found if the actor committed a killing with an intent to kill or to inflict serious bodily harm, or consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily harm. In re Estate of Klein, 474 Pa. 416, 424 n.21, 378 A.2d 1182, 1186 n.21 (1977; see Commonwealth v. Chumley, 482 Pa. 626, 394 A.2d 497 (1978). The court's comment that murder signifies a 'knowing cause of death' did not begin to touch upon the definition of malice.

"We established in Commonwealth v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974), that, to ensure that an accused pleading guilty to murder understands the nature of the charges against him, the court, on the record, must explain the elements of the crime of murder. See Pa.R. Crim.P. 319 and comment thereto. As in Ingram, appellant 'was entitled to an explanation of the crime of murder with an illustrative elucidation of the term "malice."' Id. at 204, 316 A.2d at 80. At his plea colloquy held 14 months after Ingram, appellant did not receive this necessary explanation. See Commonwealth v. Holmes, 468 Pa. 409, 364 A.2d 259 (1976)(felony murder).

"The Commonwealth argues that the colloquy was not defective. First, the Commonwealth contends that the court's failure to use the standard language 'feloniously and with malice aforethought' should not render an otherwise valid colloquy improper. The error of the Commonwealth's argument is that the colloquy was not otherwise valid. The court was free to conduct the colloquy in language of its choice. Whatever words the court chose, however, it had to tell appellant that malice was an element of a crime for which his plea would make him liable and ensure that appellant understood the meaning of malice. Cf. Commonwealth v. Hobson, ___ Pa. ____, 398 A.2d 1364 (1979)(court may couch jury instructions in language of its choice, so long as elements of offense are accurately defined)."

supra, p. 39.

The plea was permitted to be withdrawn.

Applying the cases cited in this Opinion to the facts of the Minarik case

causes the following to be apparent.

1. The plea was entered before Ingram.

2. The colloquy conducted was sufficient to show that defendant understood the general nature of the charges against him, his right to a jury trial, that the act committed was sufficient to constitute the offense charged, the range of sentences, and the consequences of his plea.

3. The colloquy did not explain the various degrees of murder, nor contain an illustrative elucidation of the term "malice."

Also applying the cases cited herein, together with Commonwealth v. Dilbeck, 466 Pa. 543, 353 A.2d 824 (1976), and Commonwealth v. Thompson, 466 Pa. 15, 351 A.2d 280 (1976), compels the result that the lack of basis to make a determination that defendant admitted a malicious killing mandates the withdrawal of the plea and the award of a new trial.

ORDER OF COURT

ZAVARELLA, J.

AND NOW, this 30th day of April, 1980, it is hereby ORDERED AND DECREED that defendant's petition to withdraw his plea of guilty be and it is hereby granted and a new trial awarded.

By the Court,

/s/ Zavarella

CERTIFICATION OF SERVICE

I, Robert Lincoln Potter, hereby certify that three true and correct copies of the foregoing "Petition for Writ of Certiorari" were served on the persons indicated below in the manner and on the date indicated below:

PERSON SERVED	MANNER	DATE
Robert L. Eberhardt, Esq. Deputy District Attorney 301 Courthouse Pittsburgh, PA 15219	U.S. Mail, First Class, Post Prepaid	Tuesday, June 16, 1981

Robert Lincoln Potter